

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES RUSSELL TERRY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No. C13-1166-JPD

ORDER GRANTING EAJA FEES

I. INTRODUCTION AND SUMMARY CONCLUSION

This matter comes before the Court on the plaintiff's March 19, 2014 Motion for Equal Access to Justice Act ("EAJA") Fees, including attorney's fees and costs under 28 U.S.C. § 2412 and 28 U.S.C. § 1920. Dkt. 18. The Commissioner opposes the motion. Dkt. 19. The undersigned, having reviewed the governing law and the parties' submissions, GRANTS plaintiff's Motion for EAJA Fees. Dkt. 18.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff filed a claim for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, alleging disability beginning on April 25, 2009. AR at 35-36. The

1 Commissioner denied plaintiff's claim initially and on reconsideration. AR at 86-101, 102,
2 103-22, 127-31. Plaintiff requested a hearing, which took place on January 9, 2012. AR at
3 31-81. On February 2, 2012, the ALJ issued a decision finding plaintiff not disabled and
4 denied benefits based on her finding that plaintiff could perform a specific job existing in
5 significant numbers in the national economy. AR at 8-26. Plaintiff's request for review was
6 denied by the Appeals Council, AR at 1-6, making the ALJ's ruling the "final decision" of
7 the Commissioner as that term is defined by 42 U.S.C. § 405(g). Plaintiff timely appealed
8 that final decision on July 10, 2013. Dkt. 3.

9 On January 6, 2014, the undersigned issued an Order reversing and remanding the
10 case for further administrative proceedings. Dkt. 16. On March 19, 2014, the plaintiff
11 submitted the instant Motion for EAJA Fees and an affidavit by plaintiff's counsel, Lynn
12 Greiner. Dkt. 18 (Greiner Aff.). On March 31, 2014, the Commissioner opposed plaintiff's
13 motion. Dkt. 19. Plaintiff replied on April 2, 2014. Dkt. 20.

14 III. DISCUSSION

15 A. Standards of Review

16 1. *Legal Standard under the EAJA*

17 The Equal Access to Justice Act ("EAJA") provides, in relevant part:

18 Except as otherwise specifically provided by statute, a court shall award to a
19 prevailing party other than the United States fees and other expenses, in
20 addition to any costs awarded pursuant to subsection (a) incurred by that party
21 in any civil action (other than cases sounding in tort), including proceedings
22 for judicial review of agency action, brought by or against the United States in
any court having jurisdiction of that action, unless the court finds that the
position of the United States was substantially justified or that special
circumstances make an award unjust.

23 28 U.S.C. § 2412(d)(1)(A).

1 Thus, to be eligible for attorney's fees under EAJA: (1) the claimant must be a
2 "prevailing party"; (2) the government's position must not have been "substantially
3 justified"; (3) no "special circumstances" exist that make an award of attorney's fees unjust;
4 and (4) the fee request must be "reasonable." 28 U.S.C. § 2412(d)(1)(A). *See, e.g.,*
5 *Commissioner, INS v. Jean*, 496 U.S. 154, 158 (1990); *Perez-Arellano v. Smith*, 279 F.3d
6 791, 792 (9th Cir. 2002).

7 Here, the Commissioner does not contest that plaintiff was the prevailing party in this
8 action, nor claim that the total amount of fees requested is unreasonable, or that special
9 circumstances exist such that an award of attorney's fees would be unjust. *See* Dkt. 19.
10 Rather, the Commissioner argues that her position in defending the ALJ's decision was
11 substantially justified.

12 2. Substantial Justification

13 Under EAJA, with certain exceptions not applicable here, the Court awards fees and
14 expenses to a prevailing party in a suit against the government unless it concludes that the
15 position of the government was "substantially justified." 28 U.S.C. § 2412(d)(1)(A). The
16 Commissioner's position is deemed substantially justified if it meets the traditional standard
17 of reasonableness, meaning it is "justified in substance or in the main, or to a degree that
18 could satisfy a reasonable person." *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002)
19 (quoted sources and internal quotation marks omitted). While the government's position
20 need not be correct, it must have a "reasonable basis in law and fact." *Id.* (citing *Pierce v.*
21 *Underwood*, 487 U.S. 552, 566 n. 2 (1988)).

22 "The government bears the burden of demonstrating substantial justification."
23 *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (quoting *Gonzales v. Free Speech*

1 *Coalition*, 408 F.3d 613, 618 (9th Cir. 2005)). Specifically, defendant’s position must be “as
2 *a whole*, substantially justified.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258–59 (9th Cir.
3 2001) (emphasis in original). That position also must be substantially justified at each stage
4 of the proceedings. *Corbin v. Apfel*, 149 F.3d 1051, 1052 (9th Cir. 1998); *see also Hardisty*
5 *v. Astrue*, 592 F.3d 1072, 1078 (9th Cir. 2010). Accordingly, the government must establish
6 that it was substantially justified both in terms of (1) “the underlying conduct of the ALJ”
7 and that (2) “its litigation position defending the ALJ’s error.” *Gutierrez*, 274 F.3d at 1259.
8 *See also Meier v. Colvin*, 727 F.3d 867, 872 (9th Cir. 2013) (“[W]e first consider the
9 underlying agency action, which . . . is the decision of the ALJ. We then consider the
10 government’s litigation position.”).

11 A district court’s “holding that the agency’s decision . . . was unsupported by
12 substantial evidence is . . . a strong indication that the ‘position of the United States’ . . . was
13 not substantially justified.” *Id.* (quoting *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir.
14 2005) (“[I]t will be only a ‘decidedly unusual case in which there is substantial justification
15 under the EAJA even though the agency’s decision was reversed as lacking in reasonable,
16 substantial and probative evidence in the record.’”) (citation omitted)). Indeed, the Ninth
17 Circuit has commented that “[i]t is difficult to imagine any circumstance in which the
18 government’s decision to defend its actions in court would be substantially justified, but the
19 underlying decision would not.” *Sampson v. Chater*, 103 F.3d 918, 922 (9th Cir. 1996)
20 (quoting *Flores*, 49 F.3d at 570 n. 11).

1 B. Underlying Agency Conduct: The ALJ Erred in Evaluating the Medical Evidence,
 2 Plaintiff's Credibility, and the Lay Witness Testimony

3 As a threshold matter, the Commissioner contends that the Court should not have
 4 directed the ALJ to complete a full DAA analysis on remand and order at least one additional
 5 consultative psychological examination to help evaluate plaintiff's functioning following his
 6 release from inpatient treatment. Dkt. 19 at 4. Specifically, the Commissioner argues that
 7 the ALJ should not be required to conduct a DAA analysis because "[h]ere, neither the ALJ
 8 nor the Court found the claimant disabled; thus, a 'full DAA analysis' does not comport with
 9 SSR 13-2p." *Id.* at 3. In addition, because "the ALJ did not find the evidence ambivalent or
 10 inadequate," the ALJ did not have a duty to further develop the record. *Id.* at 3-4.

11 The Commissioner's arguments, however, ignore the fact that the Court did not find
 12 that the ALJ's failure to take these actions in the first instance constituted harmful error. Nor
 13 did the Court issue these directives in a vacuum. Rather, the Court's directives regarding
 14 procedures to be undertaken upon remand of this case were expressly based upon the Court's
 15 finding that the ALJ erred in evaluating the medical opinion evidence, including the opinions
 16 of each of plaintiff's evaluating physicians.

17 Specifically, the Court's primary reason for remanding the case was the fact that the
 18 ALJ's overarching conclusion that plaintiff's medical records "clearly document significant
 19 improvement with both treatment and subsequent sobriety" was not supported by substantial
 20 evidence. Dkt. 16 at 14-15.¹ Although plaintiff entered an inpatient treatment program for
 21 substance abuse from August through November 2011, the records from this program "do not

22 ¹ The Court found that "[b]ecause the ALJ utilizes this reason to reject the opinion of
 23 every one of plaintiff's evaluating physicians, this error was harmful[.]" *Id.* at 14-15.

1 provide a picture of plaintiff's functioning sufficient to undermine the prior opinions of all of
2 plaintiff's examining physicians. Indeed, the ALJ appears to have largely assumed that
3 plaintiff's symptoms abated due to his sobriety in the program." *Id.* at 16. As plaintiff's
4 counselors at the program indicated that plaintiff's mental health disorders "significantly
5 interfere with addiction treatment" and "did not indicate that plaintiff's psychiatric
6 impairments and mental health symptoms were caused by alcohol or drugs," the Court was
7 not assured that plaintiff's drug and alcohol treatment necessarily eliminated all the
8 functional limitations identified by plaintiff's evaluating and treating providers. *Id.* at 16-17.

9 Thus, the Court directed the ALJ to conduct a DAA analysis on remand "to clarify the
10 ALJ's findings with respect to the impact of plaintiff's substance abuse on his functional
11 limitations," and also "order at least one additional consultative psychological examination to
12 help evaluate plaintiff's functioning following his release from inpatient treatment." *Id.* at
13 17. As discussed further below, the fact that the Commissioner disagrees with the Court's
14 conclusion that a DAA analysis and consultative psychological examination would be helpful
15 to clarify the extent of plaintiff's limitations is insufficient to establish "substantial
16 justification" for the ALJ's erroneous evaluation of the medical evidence of record.

17 The Commissioner also argues that the ALJ did not err in evaluating each of the
18 doctors' opinions, as well as plaintiff's credibility and the lay witness testimony. Dkt. 19 at
19 4-11. In its Order, however, the Court found that the ALJ's reasons for rejecting each of the
20 examining doctors' opinions was not supported by specific and legitimate reasons. In
21 addition, the Court directed the ALJ, on remand, to reevaluate plaintiff's credibility "because
22 this case is being remanded for reconsideration of the medical evidence, and . . . credibility
23 determinations are inescapably linked to conclusions regarding medical evidence[.]" *Id.* at

23. The Court further noted that “the ALJ rejected [the lay witness testimony] for the same reasons she dismissed [the opinions] of plaintiff’s evaluating doctors,” and “in light of the ALJ’s stated reasons for discounting the lay witness testimony, it appears the ALJ’s assessment was affected by her prior legal errors.” *Id.* at 24.

Thus, the Commissioner mainly reiterates arguments from its opposition brief to defend the ALJ’s decision, and those “new” arguments offered in support of the ALJ’s decision are not meritorious. The Court concluded that ALJ’s decision was not supported by substantial evidence, and the Commissioner has not met its burden of establishing that the ALJ’s position below was substantially justified.

C. Litigation Position: The Commissioner Was Not Substantially Justified in Defending the ALJ’s Errors

The crux of the Commissioner’s opposition to plaintiff’s EAJA fees motion is that “although this Court agreed with Plaintiff, regarding the dispute over the medical opinions, Plaintiff’s credibility, and lay evidence, these are issues over which reasonable minds could differ. The Commissioner’s position defending the ALJ’s decision at this Court was reasonably based in law and fact.” Dkt. 19 at 11 (citing *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005)). Significantly, however, the Commissioner fails to cite or acknowledge the Ninth Circuit Court of Appeals’ recent decision in *Meier v. Colvin*, which is controlling precedent.

In *Meier*, the Ninth Circuit held that where the court has concluded “that the ALJ’s decision was not supported by substantial evidence . . . the government’s underlying action

1 was not substantially justified.” *Meier*, 727 F.3d at 872.² The *Meier* court further held that
2 “[b]ecause the government’s underlying position was not substantially justified, *we need not*
3 *address whether the government’s litigation position was justified.*” *Id.* (emphasis added)
4 (citing *Shafer*, 518 F.3d at 1071) (“The government’s position must be substantially justified
5 at each stage of the proceedings.”). Moreover, *Meier* asserted that “[e]ven if we were to
6 reach the issue, we would conclude that the government’s litigation position – defending the
7 ALJ’s errors on appeal – lacked the requisite justification.” *Id.* at 873 (citing *Sampson*, 103
8 F.3d at 922) (“It is difficult to imagine any circumstance in which the government’s decision
9 to defend its actions in court would be substantially justified, but the underlying
10 administrative decision would not.”).

11 Thus, *Meier* stands for the general proposition that where the government’s
12 underlying position was not substantially justified, the Court typically need not address the
13 issue of whether the government’s litigation position was substantially justified.³ *See e.g.*,
14 *Nelson v. Comm’r of Soc. Sec. Admin.*, 2014 WL 198779, *3 (D. Or. January 15, 2014)
15 (“Because the government’s underlying position was not substantially justified, [this Court]
16 need not address whether the government’s litigation position was justified.”) (citing *Meier*,

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19 ² Specifically, in *Meier*, the court found that the ALJ erred by failing to provide
20 specific and legitimate reasons for rejecting a doctor’s opinion that plaintiff was incapable of
21 working, and by failing to provide clear and convincing reasons for discounting plaintiff’s
credibility. *Meier*, 727 F.3d at 872. Based upon this finding, the court concluded that “the
government’s underlying action was not substantially justified in this case.” *Id.*

22 ³ However, even if the holding of *Meier* should be construed more narrowly, the
23 Court finds that the Commissioner’s lengthy defense of the ALJ’s decision largely reiterates
arguments that this Court rejected in its prior order reversing and remanding the case for
further administrative proceedings.

1 727 F.3d at 872); *Clark v. Colvin*, 2013 WL 4774642, *3 (D. Ariz. September 5, 2013)
2 (same); *Mattson v. Astrue*, 2013 WL 6096327, *3 (D. Or. November 20, 2013) (same).

3 Accordingly, this is not one of the “decidedly unusual cases” in which there is
4 substantial justification under the EAJA even though the agency’s decision lacked
5 reasonable, substantial and probative evidence in the record. *See Thangaraja*, 428 F.3d at
6 874. As discussed above, the Commissioner’s defense of the ALJ’s decision mainly restates
7 arguments that the Court previously rejected in its order remanding this matter for further
8 proceedings. In light of the ALJ’s erroneous evaluation of the medical evidence, plaintiff’s
9 credibility, and lay witness evidence, the Court is not persuaded that the Commissioner was
10 substantially justified in defending the ALJ’s determination in this case.

11 IV. CONCLUSION

12 For the foregoing reasons, the plaintiff’s Motion for EAJA fees, Dkt. 18, is
13 GRANTED. Specifically, attorney’s fees in the amount of \$8,096.27, which includes 3.8
14 hours of attorney time relating to preparation of plaintiff’s reply brief, is awarded to plaintiff
15 pursuant to *Astrue v. Ratliff*, -- U.S. --, 130 S.Ct. 2521, 177 L.Ed.2d 91 (2010). If it is
16 determined that plaintiff’s EAJA fees are not subject to any offset allowed under the U.S.
17 Department of Treasury’s offset program, then the check for the EAJA fees shall be made
18 payable to the order of Lynn Greiner, Chihak & Associates.

19 DATED this 11th day of April, 2014.

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21 JAMES P. DONOHUE
22 United States Magistrate Judge
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